UPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 329

WILLIAM G. BRAKEFIELD, *Petitioner*,

v.

WALTER P. McFARLAND, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on the 24th day of April, 1968.

OPINION BELOW

Neither the United States Circuit Court of Appeals for the District of Columbia Circuit, nor the United States District Court for the District of Columbia rendered any opinion herein. The judgment of the

United States Court of Appeals for the District of Columbia Circuit is annexed as Appendix A, and the judgment of the United States District Court is annexed as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia (App. A) was entered April 24, 1968 affirming the judgment of the United States District Court for the District of Columbia (App. B). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) to review a judgment of an United States Court of Appeals.

QUESTION PRESENTED

May a District Court refuse to accept a plaintiff's choice of forum and dismiss a cause of action for *forum non conveniens* on the ground that it can thereby reduce its congested docket when there is no showing of inconvenience to defendant and when plaintiff's ability to present his case is likely impeded by trial in another forum.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C.A. Sec. 1404

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

District of Columbia Code Sec. 11-521

> (a) Except in actions or proceedings over which exclusive jurisdiction is conferred by law upon other courts in the District, the United States District Court for the District of Columbia, in addition to its jurisdiction as a United States

district court and to any other jurisdiction conferred by law, has all the jurisdiction possessed and exercised by it on January 1, 1964, and has original jurisdiction of all:

(1) civil actions between parties, where either or both of them are resident or found within the District, and . . . .

STATEMENT OF THE CASE

1. Petitioner, a citizen of the State of Virginia brought this action for malicious prosecution in the District Court of the District of Columbia against Respondent, also a citizen of Virginia. Service was made on Respondent within the District, thus invoking jurisdiction of the court pursuant to D.C. Code Sec. 11-521. On motion, the District Court dismissed "for inconvenience of forum" (App. B) and the Court of Appeals affirmed.

2. No contention was or can be made that the forum was inconvenient to the defendant or to his witnesses. Rather, Respondent urged that *forum non conveniens* should be invoked in that the District of Columbia Court's docket was congested and the litigation arose out of occurrences in Arlington, Virginia. No effort was made to show that there would be any greater inconvenience or impedance to Respondent by trial in the District of Columbia rather than in State Court in Arlington, or elsewhere, in Virginia. A showing was made by Petitioner that trial elsewhere would impede him in that his proofs of damages would be adduced in substantial part from financial institutions located in the District of Columbia, not amenable to Virginia state process, and unlikely to voluntarily testify. While the District of Columbia Code contains a procedure under which District witnesses are avail-

able to out of state courts in *criminal* cases (see District of Columbia Code, Section 23-801, et seq.), there is no such procedure or provision with respect to *civil* cases under which testimony and records located in the District of Columbia can be subpoenaed for civil trial outside of the District. A plain showing that the chosen forum was and continues to be *the* convenient forum was therefor made.

REASONS FOR THE ALLOWANCE OF THE WRIT

The District Court for the District of Columbia was and continues to be convenient to Petitioner and "... unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 508 (1947).

No inconvenience has been shown by the Respondent, and, in fact, there is none that can be shown. Respondent resides in Arlington, Virginia and his home and office are not more than 4 miles by road from the District Court for the District of Columbia. Any witnesses whom he might call, will certainly find it as easy, if not easier, to arrange their appearance in the District of Columbia Court as in any other court where this action could be brought, and process for their appearance is equally available to him.

The doctrine of *forum non conveniens* is a court made doctrine which is based on equity and designed to prevent oppression of a defendant. *Moore, Federal Practice* 4.02[5] (1966); *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 507 (1947). No burden whatsoever to Respondent was shown.

Nor is there any evidence that Petitioner has sought to have the trial take place at an inconvenient place for the Respondent. The Court below was asked to, and did dismiss on the ground that it could thereby reduce its docket. It is true that courts have taken this *factor* into consideration in *forum non conveniens* cases. *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 508 (1947). But, as a reading of *Gulf Oil* makes clear, it is only one among many factors, *and cannot by itself become the basis for dismissal absent unfair burden on the defendant.* For this would completely divert the doctrine from its equity founded purpose designed to ensure a defendant against oppression, *Altman* v. *Central of Georgia Railway,* 124 U.S. App. D.C. 155, 363 F. 2d 284 (1966) *cert. den.* 384 U.S. 920 (1966); *Daquila* v. *Schlosberg,* 102 U.S. App. D.C. 366, 253 F. 2d 888 (1958); *Caspar* v. *Devine;* 103 U.S. App. D.C. 193, 257 F. 2d 197 (1958); and *Wiren* v. *Laws,* 90 U.S. App. D.C. 105, 194 F. 2d 873 (1951), to a doctrine designed to enable courts to sweep clear their dockets.

This case was filed, and dismissed, as a companion to *Westreich* v. *McFarland,* see No. 305 this term. In *Westreich* jurisdiction rested on diversity and service within the District under Sec. 11-521 of the D.C. Code. Dismissal there is contended to violate the provisions of Sec. 1404(a) (28 U.S.C. 1404) mandating transfer of a case to any other district "where it might have been brought" rather than dismissal in *forum non conveniens* cases. Since diversity does not appear in this case, the cause could not have been brought in a federal court other than the District of Columbia, and therefore Sec. 1404(a) does not apply. The difference in the jurisdictional bases in the two cases, one calling

into play Sec. 1404(a) and the other not, would give a definitive swath to the ruling here and lay to rest a recurring problem area. The Court of Appeals for the District of Columbia Circuit has erected a new and far-reaching rule of dismissal "for the convenience of the court" by these two cases, and the policy considerations which underlie this rule require early appraisal by this Court in its supervisory capacity.

CONCLUSION

The District Court in ordering the dismissal of Petitioner's cause on the grounds of *forum non conveniens*, erred in:

(a) ordering the case dismissed; and,

(b) in finding that the doctrine of *forum non conveniens* was applicable.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1967

No. 21,517

STANLEY WESTREICH, *Appellant,*

v.

WALTER P. MCFARLAND, *Appellee.*

No. 21,518

WILLIAM BRAKEFIELD, *Appellant,*

v.

WALTER MCFARLAND, *Appellee.*

Appeals from the United States District Court for the District of Columbia.

Before: Bastian, Senior Circuit Judge, and Burger and McGowan, Circuit Judges.

Judgment

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION THEREOF, it is ordered and adjudged by this Court that the orders of the District Court appealed from in these cases are hereby affirmed.

Per Curiam

Dated: April 24, 1968

APPENDIX B

Order

This cause having come on to be heard upon the motion of the defendant, Walter P. M Farland, to dismiss the complaint for inconvenience of forum, and the Court having heard the arguments of counsel for both the defendant and the plaintiff and being fully advised in the premises; it is this 18th day of October, 1967.

ORDERED, that the motion of the defendant, Walter P. McFarland, to dismiss the complaint for inconvenience of forum be, and the same hereby is granted, and the complaint is hereby dismissed.

/s/ EDWARD M. CURRAN
Chief Judge Edward M. Curran

PREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

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OCTOBER TERM, 1967

No. 305

STANLEY WESTREICH,
Petitioner,

v.

WALTER P. MCFARLAND,
Respondent.

No. 329

WILLIAM G. BRAKEFIELD,
Petitioner,

v.

WALTER P. MCFARLAND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The United States Court of Appeals for the District of Columbia Circuit affirmed *per curiam* without an opinion (App. A of Petitions) the judgments of the United States

District Court for the District of Columbia which were also rendered without an opinion (App. B of Petitions).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petitions.

QUESTION PRESENTED

Whether the District Court clearly abused its discretion in dismissing petitioners' complaints against respondent for malicious prosecution on the ground of *forum non conveniens*, where the uncontroverted facts before the Court showed that all of the parties work in Arlington, Virginia; that one petitioner and the respondent live in Arlington and the other petitioner formerly resided in Virginia before moving to Maryland; that all of the events complained of occurred in the Arlington area and none in the District of Columbia; that all of the witnesses needed by the parties to litigate the merits of the causes of action alleged are available in Virginia and none in the District; that the litigation must be determined by the substantive law of Virginia; and there was no present bar to petitioners' refiling their suits in Virginia.

STATUTE INVOLVED

The statute involved is 28 U.S.C. § 1404(a) which is set forth in the Petitions at p. 2.

STATEMENT

On October 9, 1967, petitioners Westreich and Brakefield each filed a complaint against respondent seeking damages for malicious prosecution in the United States District Court for the District of Columbia. (App. in Westreich Brief,[1] pp. 1-7; App. in Brakefield Brief.) The

[1] All citations to the appendices in the briefs of Westreich, Brakefield and McFarland refer to the briefs filed in the United States Court of Appeals for the District of Columbia Circuit.

material allegations of the complaints, phrased almost identically, were as follows:

On October 20, 1966, respondent was alleged to have given false testimony before the Grand Jury for Arlington County, Virginia, which caused the petitioners to be indicted for violating the criminal code of Virginia by, *inter alia*, conspiring to injure respondent in his business. In December 1966, the conspiracy charges against petitioners were dismissed because the statute of limitations had run. Subsequently, the perjury indictments against petitioners were dismissed on the ground that the depositions in which the perjuries were allegedly committed had not been completed and filed with the Arlington Circuit Court.

Respondent is a long-time resident of Arlington and maintains his place of employment there. Petitioners obtained personal service on respondent in the District of Columbia only by having him followed from his residence in Virginia when he drove his family to a Washington restaurant. (App. in Westreich Brief, p. 10.)

On October 17, 1967, respondent filed motions to dismiss petitioners' actions on grounds of *forum non conveniens*. (App. in McFarland Brief, pp. 1-4.) An expedited hearing was requested by respondent to permit petitioners sufficient time to refile their actions in the appropriate forum in Virginia before the statute of limitations had run. (App. in Westreich Brief, p. 11.)

The uncontroverted facts before the District Judge who heard argument on respondent's motions to dismiss were that petitioners and respondent had worked in Arlington for many years; that petitioner Brakefield and respondent resided in Arlington and petitioner Westreich formerly lived there before moving to Maryland; that all of the events constituting the alleged causes of action occurred in Virginia and none in the District of Columbia; that all of the witnesses required by the parties were available in

Virginia and none in the District; and that the cases had to be tried in accordance with the laws of Virginia. (App. in Westreich Brief, pp. 10-11; App. in McFarland Brief, pp. 1-2.)

Contrary to the assertion by petitioner Brakefield (Brakefield Petition, p. 3), neither petitioner made any showing in the District Court of any reason why the suits should be tried in the courts of the District of Columbia instead of in Virginia. (App. in Westreich Brief, pp. 9-11.)

After oral argument, the District Judge granted respondent's motions to dismiss petitioners' complaints for inconvenience of forum. (App. B of Petitions.)

On October 20, 1967, petitioners Brakefield and Westreich refiled their actions for malicious prosecution against respondent, respectively, in the Circuit Court for Arlington County and in the United States District Court for the Eastern District of Virginia, sitting in Alexandria. Respondent was properly served in both suits which are now awaiting disposition on the merits.

After briefing and oral argument a panel of the United States Court of Appeals for the District of Columbia Circuit unanimously affirmed *per curiam*, without an opinion, the orders of the District Court in question. (App. A of Petitions.)

I. The Decision Below is Clearly Correct.

Under the guiding principles stated by this Court in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), the District Court below had discretion[2] to resist an unwarranted imposition upon its jurisdiction by dismissing petitioners' complaints through the application of the doc-

[2] The District Court is subject to reversal only for "a clear abuse" of its discretion. *Hopson* v. *Hopson*, 95 U.S. App. D.C. 285, 221 F.2d 839, 842 (1955). See *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508, 511 (1947).

trine of *forum non conveniens* if trial in another forum would best serve (1) the public interest in having local controversies decided at home instead of in congested tribunals in jurisdictions having no contact with the parties, witnesses, or events giving rise to the suit; (2) the convenience of the parties; and (3) the course of justice.

In the instant case, the District Court was clearly correct in granting respondent's motions to dismiss petitioners' actions for complete inappropriateness of forum where the undisputed facts before the court revealed that the District of Columbia simply had no contact with the parties or the events giving rise to the alleged malicious prosecution. Respondent stressed to the District Court that all of the events constituting the alleged cause of action occurred in Arlington, Virginia, and none in the District of Columbia; respondent and petitioners maintain their principal places of work in Arlington and respondent and petitioner Brakefield reside there; and the litigation must be governed by the substantive law of the State of Virginia. (App. in McFarland Brief, pp. 1-4; App. in Westreich Brief, pp. 9-12.) Petitioners have not disputed respondent's contention that the witnesses needed to establish the causes of action are located in Northern Virginia and not in the District of Columbia.

Certainly, under any rational application of the *Gulf Oil* criteria to the foregoing facts, the District Court must be held to have soundly exercised its discretion in dismissing the complaints, thus serving the public interest by remitting petitioners to the courts in Virginia where the actions should properly have been filed in the first instance.

Both petitioners have suggested that the District Court "was asked to, and did dismiss solely on the ground that it could thereby reduce its docket." (Brakefield Petition, p. 5; Westreich Petition, p. 5.) Of course, as *Gulf Oil* clearly recognized, there is a legitimate public interest in having a local controversy tried at its origin instead of

in a congested court in a jurisdiction having no contact with the parties, witnesses, or events giving rise to the suit. 330 U.S. at 508-509. However, the record is clear that the burdened state of the docket in the District Court was merely one of the grounds urged by respondent for dismissal of the instant actions. Equal emphasis was placed on the argument that the cases should be tried in Virginia and not in the District of Columbia because that jurisdiction had all-inclusive contacts with the parties and events constituting the alleged wrongs. (App. in McFarland Brief, pp. 1-5; App. in Westreich Brief, pp. 9-12.) No opinion was rendered by the District Court; consequently, petitioners must be engaged in sheer speculation when they argue that the District Court's desire to lessen its caseload was the sole basis for the dismissals. Although we cannot know the precise basis for the District Court's judgments, it is clear that dismissal and subsequent trial in Virginia was the result dictated by a proper balancing of both the public interest factors stated in *Gulf Oil* and the private interests of the litigants.

Neither petitioner has made the slightest showing as to why the courts and juries of the District of Columbia should additionally be burdened with the task of resolving a dispute between residents of Virginia and Maryland concerning alleged impropriety in the actions of respondent and the Commonwealth's Attorney for Arlington County, and the Arlington County Grand Jury, which resulted in petitioners' indictments for violating the Virgina criminal code. Petitioners offered no explanation to the District Court below as to why they had attempted to empower the District of Columbia courts to hear this local Virginia controversy through the extraordinary method of placing respondent under surveillance and having him served when he drove into the District on a social outing.[3]

[3] The Courts of the District of Columbia have been sensitive to unwarranted imposition upon their jurisdiction by residents of other states seeking resolution of disputes entirely foreign to the District. See *Gross* v. *Owen*, 95 U.S. App. D.C. 222, 221 F.2d 94 (1955); *Nee* v. *Dillon*, 99 U.S. App. D.C. 332, 239 F.2d 953 (1956).

Even on appeal, petitioners advanced only the inadequate justification that trial in Virginia would impede them in proving [special] damages[4] by making access difficult to testimony from certain financial institutions located in the District which would allegedly be uncooperative.

Petitioners argue that their choice of a forum is entitled to be respected. However, the right of a plaintiff to select his forum must be accorded scant consideration where plaintiff has for reasons of strategy chosen to litigate in a jurisdiction having no contact with the parties or events constituting the alleged cause of action.

II. Petitioner Westreich's Argument that the District Court Possessed Power Only to Transfer His Action is Academic.

Petitioner Westreich, presently a resident of Maryland,[5] argues that under 28 U.S.C. § 1404(a) the District Court had no power to dismiss his complaint for *forum non conveniens* and could only have transferred the action to any other district where it might have been brought.

This Court need not reach the merits of petitioner's contention which is academic. Even assuming that transfer rather than dismissal was the appropriate course for the District Court to have considered, under the facts of this case it is clear that the federal court to which petitioner's action would be transferred is the District Court for the Eastern District of Virginia, which has jurisdiction over Arlington County, the situs of the origin of the controversy, and the place where two of the parties reside, all of the parties work, and where the witnesses can most

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[4] Virginia follows the rule that general damages need not be proved if malicious prosecution is established. See *Giant of Virginia, Inc.* v. *Pigg*, 207 Va. 679, 152 S.E.2d 271 (1967); *Spitzer* v. *Clatterbuck*, 202 Va. 1001, 121 S.E.2d 466 (1961).

[5] The action filed below by petitioner Brakefield, who resides in Virginia, as does respondent, could not have been transferred to any other district court for lack of diversity.

readily be found. However, on October 20, 1967, Westreich's action was refiled in that very federal court after the dismissal below, and the suit is now in a posture to be expeditiously adjudicated on the merits. Nothing meaningful could be accomplished, therefore, by remanding Westreich's suit, on any grounds, to the District Court for the District of Columbia. The jurisdiction of this Court should not be exercised to decide a moot question which will not affect the matter in issue before it.[6]

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petitions for writs of certiorari should be denied.

Respectfully submitted,

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September 6, 1968

[6] See, e.g., *Local No. 8-6 Oil Workers Union* v. *Missouri*, 361 U.S. 363, 367 (1960).